HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2) (b)

Description of the case.

W.P. No. 859 /06 (M/S)

Jagdish Narayan Mehra

VS

Prescribed Authority/C. J.M. Ntl. & others.

Approved for reporting

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~~Not approved for reporting~~

Date of decision: 06.07.2006

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

WRIT PETITION NO.859 (MS) OF 2006

Jagdish Narayan Mehra,
S/o Sri J.N. Mehra,
R/o Merino Hotel,
Mall Road, Tallital, Nainital. .....Petitioner

Versus

1. Prescribed Authority/C.J.M. Nainital.
2. Ranjan Pratap, S/o Shri Ram Pratap, C/o Pratap Regency, Tallital, Nainital. .....Respondents.

Hon'ble Rajesh Tandon, J.

Heard Sri C.D. Bahuguna, Advocate for the petitioner, Standing Counsel for the respondent no. 1 and Sri B.D. Kandpal, Advocate for the respondent no.2.

By the present writ petition, the petitioner has prayed for a writ of certiorari quashing the order dated 12th June, 2006 passed by the respondent no.2 and further for a writ of mandamus commanding the respondent no. 1 to permit the petitioner for cross-examination on the statements made by him in his affidavit filed before the Prescribed Authority.

Briefly stated, respondent no.2/landlord filed a release application under Section 21 (1) (a) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 in the Court of Prescribed Authority Nainital on 21.11.2003. The case was registered as Rent Control Case No.11 of 2003.

During the pendency of the aforesaid release application, both the parties have filed the affidavit in support of their cases.

Petitioner has filed an application (Annexure No.13 to the writ petition), where, he has prayed for cross-examination. The prescribed authority has rejected the application on the ground that affidavits which have been filed, have been duly controverted by the landlord and as such there is no occasion for cross-examination. The prescribed authority has observed to the following effect:-

"चूंकि प्रस्तुत प्रार्थना पत्र में वर्णित तथ्यों एवं कथनों के बावत् विपक्षी को साक्ष्य का अवसर विपक्षी की याचना पर इससे पूर्व र्क बार दिये गये। जिसके बावत् विपक्षी द्वारा बतौर साक्ष्य प्रतिप्रपथपत्र दाखिल किये जा चुके हैं और तदोपरान्त पक्षकारान का साक्ष्य का अवसर पक्षकारों की याचना पर समाप्त किया जा चुका है। ऐसी स्थिति में अब विपक्षी को प्रार्थी से जिरह का अवसर दिया जाना मात्र वाद कार्यवाही को लम्बित करना होगा। जहां तक शपथपत्रों में हस्ताक्षरों की भिन्नता का प्रप्रन है, के बाबत् विपक्षी हस्त एवं अंगुष्ठ छाप विप्रेषज्ञ से कथित हस्ताक्षरों की भिन्नता को साबित करवा सकता था।"

Counsel for the petitioner Sri C.D. Bhauguna has argued that before accepting the affidavit in the case, the cross examination is necessary, on the same part, the evidence of the parties. Order 19 Rule 1 of the C.P.C. provides the power to prove the affidavit. It reads as under:-

"1. Power to order any point to be proved by affidavit.-Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thins reasonable:

Provided that where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit."

Counsel for the petitioner has referred ***Mohammad Hasnain Vs. Ist Addl. Civil Judge, Jaunpur and another ARC 1995 (1)512.*** Relevant observations are quoted below:-

"Ordinarily cross-examination should be permitted under Section 21 and it is only rare and exceptional cases were cross-examination should be refused. Section 21 proceedings are more similar to a Civil Suit where is a right to cross-examination. Although Section 21 proceedings are not strictly speaking a suit but yet they have many of the features of a Civil Suit.

It would be appropriate in Section 21 proceedings if examination-in-chief is permitted on affidavit but the deponent should be subjected to cross-examination otherwise the veracity f the statement on affidavit cannot be properly attested. Mere filing of a counter-affidavit is no substitute for cross-examination and it does not properly test the veracity of the witnesses."

In ***Smt. Sudha Devi Vs. M.P. Narayanana and other AIR 1988 SC 1381***, the Division Bench has observed as under:-

"Besides, affidavit are not included in the definition of 'evidence' in Section 3 of he Evidence Act and can b e used as evidence only if for sufficient reason court passes an order under Order 19, Rule 10r 2 of the Code of Civil Procedure."

In ***Mohammad Ismail Khan Vs. Prescribed Authority, Bareilly and others 2003 (1) ARC Page 607***, it has been observed as under:-

"5. A perusal of the above order will show that the learned Prescribed Authority did not consider the matter on merits but rejected the application with casual observation. He has expected to apply his mind to the facts and

circumstances of the case as well as to the respective contentions of the parties before passing an order. The order, extracted above, appears to have been passed without any application of mind to the facts and circumstances of the case as also to the respective contentions of the parties and, therefore, it can easily be termed a manifest error on the fact of the order of the Prescribed Authority and the same cannot be sustained and deserves to be quashed.

6. In the result, the writ petition is allowed. The order dated 20.03.1990 passed by the Prescribed Authority is quashed. The Prescribed Authority will dispose of the application afresh in accordance with law after giving opportunity to he learned Counsel for the parties to address the Court in respect of their respective contentions. Since the matter is an old one, the Prescribed Authority will dispose of the matter as expeditiously as possible, preferably within two months from the date a certified copy of this order is presented before him."

Furthe ***Khandesh Spg & Wvg. Mills. Co. Ltd, Vs. The Rashtriya Girni Kamgar Sangh, Jalgaon, AIR 1960 SC 571*** has been referred, where the Division Bench has held as under:-

"For the Purpose of holding an enquiry or a proceeding under the Bombay Industrial Relevant Act, 1956, s. 118 of the said Act confers on the Industrial Court the same power as are vested in Courts in respect of –(a) proof of facts by affidavit; (b) summoning and enforcing the attendance of any person and examining him on oath; (c) compelling the production of documents; and (d) issuing commission for the examinations of witness. In Courts facts have to be established either by oral evidence or by documentary evidence proved in the manner prescribed by law. But Order

XIX of the Code of Civil Procedure empowers the Court to have particular facts-proved by affidavits. Under rule 1 thereof, "any Court may at any time for sufficient reason order that any particular fact or facts proved by affidavit, or that affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable." But it is subject to the proviso that where it appears to the Court that either party boa fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit. Under rule 2, "upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent." A combined effect of the relevant provisions is that ordinarily a fact has to be proved by oral evidence, but the Court, subject to the conditions laid down in Order XIX, may ask a particular fact or facts to be proved by affidavit.

If other parties agree, agreed figure can be accepted. If they agree to a decision on affidavits, that course may be followed. But in the absence of an agreement, the procedure prescribed in Order XIX of the Code of Civil Procedure may usefully be followed by the tribunals so that both the parties may have full opportunity to establish their respective cases."

As well appear from the State amendment under Order 19 Rule 1 of he C.P.C. that where it appears to the Court at the instance of either party or otherwise that the production of such witness for cross-examination is necessary, his attendance can be produced.

The power, therefore, vested with the Presiding Officer being not an absolute. It is in the discretionary power of the Prescribed Authority where is appears from the application of

either party or otherwise. By virtue of the provisions of Rule 4 substituted by Act No. 46 of 1999, amendment has been incorporated in the Code of Civil Procedure under Order 18 Rule 4 of the Code of Civil Procedure to the following effect:-

*"**[4. Recording of evidence.**-(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.*

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence (Cross-examination and re-examination) of the witness in attendances, whose evidence (examination-in-chief) by affidavit ha been furnished to the Court shall be taken either by the Co8urt or by the Commissioner appointed by it:

Provided that the Court may, which appointing a commission under this sub-rule, consider taking into account such relevant fact as it thins fit."

As will appear from the aforesaid facts, the power of cross-examination as well as examination-in-chief and re-examination has been substituted by the legislature by filing the affidavit. The words, which have been incorporated by the legislature shows that the examination-in-chef of the witness shall be on affidavit and copies thereof shall be supplied to the opposite parties by the authority, who calls him for the evidence. Similar is the provision of evidence by cross-examination of the witness in attendance, whose affidavit (examination-in-chef) by affidavit has been furnished. The aforesaid provision relating to the examination-in-chief and cross-examination came up before the Apex Court in ***Salem***

Advocate Bar Association Vs. Union of India and others 2002(6) AIR SCW page 4627, where the apex Court has held that the said power is valid and in order to expedite the litigation, the same has been introduced.

The aforesaid mode of taking evidence has been introduced for the speedy justice as enshrined by our constitution under Article 21 and it has been treated as an efficient mode for taking evidence.

In ***Khushi Ram Dedwal Vs. Addl. Judge Small Causes Court/Prescribed Authority, Meerut and others 1997 (2) page 674***, where the Division Bench of the Allahabad High Court has relied upon the decision of Lucknow Bench reported in ***Assam Dass v. Prescribed Authority/Civil Judge, Mohanlalganj, Lucknow and another, 1996 (2) A.R.C. 92*** where their Lordships have held that in order to have cross-examination, the parties, have to furnish details and necessary facts in order to pass the order as to why the cross-examination is necessary. Relevant observation is quoted below:-

"13. The proviso to Order XIX, Rule 1 has used the words "cross-examination is necessary". The effect of this proviso was considered by a Division Bench of this Court in Assam Dass v. Prescribed Authority/Civil Judge, Mohanlalganj, Lucknow and another, 1996(2) A.R.C. 92 and it was held that if the Prescribed Authority is satisfied that the cross-examination is necessary, it can allow a party to cross-examine the deponent of an affidavit. The Court observed:

"In our view a conjoint reading of Rule 1 of Order XIX, Code of Civil Procedure and Section 34 of the Act makes it quite manifest that if the Prescribed Authority is satisfied that it is necessary for the ends of justice and to elicit truth that the depoentn of the affidavit should be called upon to appear

before it for the purpose of cross-examination, the Prescribed Authority has jurisdiction and power to ask such person to appear before it for that purpose."

In the present case, the petitioner has furnished a simple application without annexing affidavit in support thereof eliciting the facts required for the cross-examination. The Prescribed Authority has found that the facts given in the application are wholly insufficient in order to invoke the provisions of cross-examination as contained under Order 19 Rule 1 of the C.P.C. read with Section 34 of the Act No. 13 of 1972. The Division Bench has observed as under:-

"14. The principle that a party is to be permitted to cross-examine on the princple of natural justice cannot be accepted in every case. Oral examination in all cases is not contemplated. Even in disciplinary inquires in exceptional cases oral evidence may not be insisted upon as held in Hira Nath Mishra V. Principa, Rajendra Medical College, A.I.R. 1973 SC 1260, and State of Haryana V. Rattar Singh, A.IR. 1977 SC 1512. If a party wants to cross-examine, he has to given the necessary facts in the application as to why the cross-examination is necessary. The Prescribed Authority will give the reasons either for allowing or refusing the cross-examination the reasons disclosed in the order of the Prescribed Authority will show whether he acted fairly or not. Considering every aspect of the matter the authority under the provisions of U.P. Act No. 13 of 1972 can permit the cross-examination of a deponent of an affidavit 0nly when it is necessary in the case."

In the same judgment reliance has been placed in ***Radha Krishna v. Vth Additional District Judge, Jalaun at Orai and others, 1985 (1) ARC Page 427***. The Bench has observed that primary objective of Act No. 13 of

1972 being expeditious disposal of the case and the oral evidence shall delay the matter. The Bench has observed that if oral evidence was contemplated to be filed and if the deponent was cross-examined, then it would not be possible to decide the release application under Section 21 (1) of the Act within a period of two months.

In ***M/s Associated cem3ent Companies Limited, Kanpur v. The Prescribed Authority /IXth Additional Munsif, Kanpur and another, 1984 (1) A.R.C. 137***, Hon'ble R.M. Sahai, J. (as he then was) held that the discretionary power has to be exercised sparingly by the Prescribed Authority while deciding the release application under Section 21 (1) (a) of the Act.

When the cross examination is necessary, it has to be decided in the context of factual back drop of the case and in the context of the nature of the proceedings under Act. The application under Section 21 (1) of the Act is to be decided expeditiously, Rule 15 (3) of the Rules framed under the Act lays down that every application under Section 21(1) of the Act shall, as for possible, be decide within two months from the date of its presentation. The legislature did not provide that oral evidence to be adduced in support of the case as contemplated under O. XVIII, Rule 4 C.P.C. but the fats are to be proved on affidavits. If unnecessarily cross-examination is permitted, that will only hamper the expeditious disposal of the case. The Supreme Court emphasized this aspect in the case of State of Jammu and Kashmir (supra). Considering this provision Hon'ble R.M. Sahai, J. as he then was, in the case of ***Radha Krishna v. Vth Additional District Judge, Jalaun at Orai and others, 1985 (1) A.R.C. 427***, observed that the primary objective of Act No. 13 of 1972 is expeditious disposal of the cases. It may be hindered if the

parties are permitted to lead oral evidence. In the case of ***Smt. Gulaicha Devi*** (Supra), the following observations was made:

"if oral evidence was contemplated to be filed and if the deponent of every affidavit was permitted to be cross-examined then it would not be possible to decide the release application under Section 21(1) of the act within a period of tow months."

After taking into consideration the aforesaid observation, the Division Bench was of the opinion that in every case, the cross-examination cannot be accepted.

Counsel for the respondent Sri B.D. Kandpal has referrrd the judgment of ***Kripal Singh Vs. Prescribed Authority Haldwani, District Nainital 1998(1) ARC Page 334***, where the Court has relied upon the Division Bench of the Allahabad High Court in ***Khushi Ram Dedwal Vs. Addl. Judge Small Causes Court/Prescribed Authority, Meerut and others 1997 (2) Page 674*** and has observed that the petitioner has not given any evidence rebutting or controverting the allegation made in the affidavit of the application and there being no illegality, the application was rejected.

In view of the Division Bench, the petitioner has to satisfy the requirement of cross-examination in every case.

Liberty is given to the petitioner to file a detailed application before the Prescribed Authority. In case petitioner files the detailed application along with the affidavit giving out the particulars regarding the facts on which the cross-examination is necessitated, the Prescribed Authority shall decide the application in accordance with the law as stated above in accordance with the observation as stated above.

Since the case relates to the year 2003, the statute provides for the disposal within a period of two months. The prescribed Authority shall dispose of the petition under Section 21(1) (a) of the Act No. 13 of 1972 within a period of two months from the date of presentation of the certified copy of the order.

Writ petition is disposed of accordingly. No order as to costs.

(Rajesh Tandon, J.)

06.07.2006
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